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PACIFIC HEALTH ADVANTAGE dba PAC
ADVANTAGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PACIFIC HEALTH ADVANTAGE dba PAC
ADVANTAGE,

Plaintiff,

v.

CAP GEMINI ERNST & YOUNG,

Defendant.

CASE NO. C07 1565 PJH

Date : May 2, 2007

Time : 9:00 a.m.

Dept : Courtroom 3, 17th Floor

Judge: Hon. Phyllis J. Hamilton

PLAINTIFF PACIFIC HEALTH
ADVANTAGE'S OPPOSITION TO
DEFENDANT CAP GEMINI ERNST &
YOUNG U.S. LLC'S MOTION TO
DISMISS, OR ALTERNATIVELY, TO
TRANSFER FOR IMPROPER VENUE

Complaint Filed : November 2006

I. INTRODUCTION

On or about November 14, 2006, plaintiff PACIFIC HEALTH
ADVANTAGE (hereinafter "PacAdvantage") filed a lawsuit for Breach
of Contract, Fraud, Negligent Misrepresentation and Negligence
against CAP GEMINI ERNST & YOUNG U.S. LLC (hereinafter "Cap
Gemini") based on Cap Gemini's failure to perform under a
contract for services. Cap Gemini has filed a Motion to Dismiss,

or Alternatively, To Transfer Venue based on an alleged
"mandatory" forum selection clause in the Agreement.

II. FACTS

On or about December 19, 2002, PacAdvantage contracted with
Cap Gemini wherein Cap Gemini was to implement software on behalf
of PacAdvantage. PacAdvantage paid Cap Gemini for services
pursuant to the contract. Cap Gemini was to provide software
implementation management services, project management services,
remediation and testing of the PX2 System (hereinafter the
"Project") before the system was to "go live".

A. The Dispute

Cap Gemini failed to consult on the Project as contracted to
do. As a result, PacAdvantage incurred the claims of several
healthcare providers for reimbursement of expenditures which were
erroneously incurred due to Cap Gemini's specific representations
of project management, including remediation and testing of PX2.

III. ARGUMENT

A. The Forum Selection Clause Is Permissive, Not Mandatory

The pertinent portion of the contract states:

"The parties will attempt in good faith to resolve any
controversy or claim arising out of or relating to this
Agreement or the Services through discussions between
the CGE&Y Vice President and the Client executive
responsible for providing and accepting the Services.
If these discussions are unsuccessful, the parties
agree that any action asserting a claim by one party
against the other party hereto arising out of or
relating to this Agreement or the Services must be
brought in the state or federal court for the county or
district wherein the party against which the claim is
brought has its principal place of business.
Notwithstanding the foregoing, any action asserting a
claim for collection of fees, expenses and/or other

compensation due or owing to CGE&Y under this Agreement **may** be brought in a state or federal court in New York, New York, which for purposes of this Agreement, is CGE&Y's principal place of business..." (2002 Agreement, attached as Exhibit A to Cap Gemini's moving papers at ¶XV.A) (emphasis added).

28 U.S.C.A. section 1404(a) provides, "for the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C.A. § 1404.

Section 1404(a) provides the court with discretion to adjudicate motions for transfer on a case-by-case basis considering convenience and fairness. *Stewart Organization, Inc. v. Ricoh Corp.* (1988) 108 S.Ct. 2239, 2244. The presence of a forum selection clause will be a significant factor that figures centrally in the district court's calculus. *Id.* The district court will be called on to address issues as the "convenience of a [particular] forum given the parties' expressed preference for that venue and the fairness of transfer in light of the forum-selection clause and the parties' relative bargaining power. *Id.*

Cap Gemini cites an abundance of legal authority stating the basis for a transfer of venue under a forum selection clause.

Case law holds:

"Absent some evidence submitted by the party opposing enforcement of the clause to establish fraud, undue influence, overweening bargaining power, or such serious inconvenience in litigating in the selected forum so as to deprive that party of a meaningful day in court, [such a] provision should be respected as the expressed intent of the parties."

Hunt Wesson Foods, Inc. v. Supreme Oil Co. (1987) 817 F.2d 75, 77.

1 Cap Gemini's dissertation of the current state of the law
2 regarding forum selection clauses is correct. Cap Gemini's
3 interpretation of the relevant contract provisions, however, is
4 not.

5 The Agreement clearly states that New York, New York *may* be
6 the forum for any issue of "collection of fees, expenses and/or
7 other compensation due or owing to CGE&Y under this Agreement."
8 (Appendix A, attached to the 2002 Agreement attached as Exhibit A
9 to Cap Gemini's moving papers at XV ¶A.)

10 The issues to be litigated in this action are the fees Cap
11 Gemini received for the quality of work performed and work they
12 failed to perform that was required under the Agreement.

13 Further, contract law requires that where language is
14 ambiguous, the court should construe the language against the
15 drafter of the contract. *Id.* at 78. If Cap Gemini disagrees
16 with this contract interpretation, then there is clearly
17 ambiguous language (PacAdvantage's interpretation versus Cap
18 Gemini's interpretation), therefore the language should be
19 construed against the drafter. Cap Gemini was the drafter of the
20 Agreement and therefore, the Agreement must be construed against
21 them. As such, we reach the same result—the suit *may* be filed in
22 New York, New York, but is not required to do so.

23 In *Hunt Wesson Foods*, the court held the forum selection
24 clause was permissive rather than mandatory. *Id.* at 77. The
25 contract provided,

26 "The Buyer and Seller expressly agree that the laws of
27 the State of California shall govern the validity,
28 construction, interpretation and effect of this
contract. The courts of California, County of Orange,

shall have jurisdiction over the parties in any action at law relating to the subject matter or the interpretation of this contract." *Id.* at 76.

The court specifically stated that the Orange County courts shall have jurisdiction, but this statement does not confer exclusive jurisdiction. *Id.* at 77.

Similar to the Agreement at issue, Cap Gemini contracted that the courts of New York, New York shall have jurisdiction but in no way grants exclusive jurisdiction. Moreover, the Agreement states that Cap Gemini shall not be liable in excess of the fees paid. (2002 Agreement, Appendix A, ¶III(D)). PacAdvantage is seeking to recover exactly this—the fees paid to Cap Gemini because they failed to perform per the Agreement which is exactly what the "compensation" language in the Agreement provides.

As such, PacAdvantage properly filed the Complaint in San Francisco County and Cap Gemini's Motion to Dismiss, or Alternatively, to Transfer should be denied.

B. Alternatively, Enforcement Of The Forum Selection Clause Would Deprive PacAdvantage Of Their Day In Court

PacAdvantage must have the ability to litigate their claim for redress in an appropriate forum. Cap Gemini's attempted dismissal and removal is an effort to prevent PacAdvantage from "their day in court."

Under normal circumstances, forum clauses are "prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." *M/S Bremen v. Zapata Off Shore Co.* (1972) 92 S.Ct. 1907, 1913.

"Evidence establishing fraud, undue influence, overweening

1 bargaining power, or such serious inconvenience in litigating in
2 the selected forum so as to deprive that party of a meaningful
3 day in court" will be grounds for denial of a forum selection
4 clause. *Hunt Wesson Foods, Inc. v. Supreme Oil Co.* 817 F.2d at
5 77.

6 Assuming arguendo that Cap Gemini's contract interpretation
7 is correct and the action must be venued in New York, New York,
8 Cap Gemini has effectively accepted compensation for work they
9 failed to perform including software implementation management
10 services, project management services, remediation and testing of
11 the Project before the system was to "go live" and have forced
12 PacAdvantage to prosecute the lawsuit in an inconvenient forum,
13 depriving PacAdvantage of their day in court. PacAdvantage can
14 demonstrate that a forum in New York is "sufficiently
15 inconvenient to justify retention of the dispute." *P&S Business
16 Machines, Inc. v. Cannon USA, Inc.* (2003) 331 F.3d 804, 807.

17 California courts are yet to outline the elements to
18 determine what constitutes the "reasonableness" of a forum
19 selection clause, therefore we defer to persuasive authority in
20 doing so. To determine the reasonableness of a forum selection
21 clause, courts should consider: (1) the law that governs the
22 formation and construction of the contract, (2) the residency of
23 the parties, (3) the place of execution and/or performance of the
24 contract, (4) the location of the parties and their witnesses,
25 (5) the inconvenience to the parties of any particular location,
26 and (6) whether the clause was bargained for. *Calanca v. D & S
27 Manufacturing Co.* (1987) 157 Ill.App.3d 85, 88.

1 The residency of the parties is California. PacAdvantage is
2 located exclusively in Northern California. (Decl. of L. Savage
3 at ¶¶4,11). Cap Gemini has an office in San Francisco. (2002
4 Agreement attached as Exhibit A to Cap Gemini's moving papers at
5 p. 1). Further, the Agreement that was drafted by Cap Gemini and
6 attached to Cap Gemini's motion as Exhibit A is written on Cap
7 Gemini letterhead with the office location stated as "555
8 California Street, Suite 1800, San Francisco, California 94104;
9 (415) 951-3200." (2002 Agreement attached as Exhibit A to Cap
10 Gemini's moving papers at p. 1). This address is obviously in
11 California and the phone number is local to San Francisco. The
12 employees of PacAdvantage had no contact with any representative
13 of Cap Gemini's New York office and local Cap Gemini employees
14 performed the consulting. (Decl. of L. Savage at ¶8). The
15 entire business relationship was between PacAdvantage and the Cap
16 Gemini office in San Francisco. (Decl. of L. Savage at ¶¶7, 8,
17 9).

18 The Agreement was executed and performed only in Northern
19 California. (Decl. of L. Savage at ¶¶7, 9, 10). Moreover, the
20 location of the parties and witnesses are located in Northern
21 California as well. (Decl. of L. Savage at ¶¶6, 8). Cap
22 Gemini's "Principal" on the Project was Ira Rothman. (Decl. of
23 L. Savage at ¶¶8). Mr. Rothman was the individual that signed
24 the Agreement on behalf of Cap Gemini. (2002 Agreement attached
25 as Exhibit A to Cap Gemini's moving papers at p. 6). Mr. Rothman
26 stated in the last paragraph of the Agreement that he could be
27 reached at (415) 951-3217 or on his cell phone at (916) 508-0988.
28

(2002 Agreement attached as Exhibit A to Cap Gemini's moving papers at p. 6). The area code (415) is local to San Francisco and (916) is local to the Sacramento area, both in Northern California. Mr. Rothman will be Cap Gemini's key witness in the defense of this matter and Mr. Rothman's local information is further evidence that he was and is located in Northern California. Moreover, the employees of PacAdvantage are also located in Northern California. (Decl. of L. Savage at ¶6).

PacAdvantage would be greatly inconvenienced if it were forced to prosecute this action in New York, New York because all the parties are located in Northern California. (Decl. of L. Savage at ¶6). Requiring PacAdvantage to transport every potential witness is extremely costly and inconvenient. PacAdvantage is an inactive non-profit company and does not have the funds to fly many individuals back and forth cross country to prosecute an action that arose based on a contract that was executed and performed entirely in Northern California. (Decl. of L. Savage at ¶13).

PacAdvantage was given no opportunity to bargain for the forum selection clause which illustrates undue influence and fraud on the part of Cap Gemini. PacAdvantage was approximately two months behind in the implementation of the Project and Cap Gemini knew this information when PacAdvantage contracted with them. (2002 Agreement attached as Exhibit A to Cap Gemini's moving papers at 1). Further, Appendix A attached to the Agreement is a form contract that Cap Gemini prepares for all HIPAA-related services. This effectively was a "take it or leave

1 it" contract giving PacAdvantage no ability to bargain. Further,
2 PacAdvantage is a non-profit organization and Cap Gemini is a
3 world-renowned company with unlimited funds and resources. Cap
4 Gemini knew that PacAdvantage was in a bind with the delayed
5 implementation of the Project and took advantage of PacAdvantage
6 by including a forum selection clause in New York, New York.

7 Moreover, Leesa Tori, the former Director of PacAdvantage
8 signed the Agreement on December 20, 2002. (2002 Agreement
9 attached as Exhibit A to Cap Gemini's moving papers at p.6). The
10 fax header on the Agreement Cap Gemini attached to the Motion
11 shows only six pages were transmitted, therefore it did not
12 include Appendix A. (2002 Agreement attached as Exhibit A to Cap
13 Gemini's moving papers at p.6). Further, the Agreement attached
14 as Exhibit A shows a revised date on the bottom of "03.03".
15 (Appendix A, attached to the 2002 Agreement attached as Exhibit A
16 to Cap Gemini's moving papers at p.1.) Therefore, the document
17 produced in support of Cap Gemini's Motion was revised after it
18 was signed by PacAdvantage.

19 Requiring all the potential witnesses and parties involved
20 to travel cross country to New York when the only relationship
21 with New York is Cap Gemini's principal place of business is an
22 "inconvenient forum," and establishes fraud and undue influence,
23 to say the least.

24 Further, it is contrary to public policy to permit Cap
25 Gemini to fail to perform to the expectation of the contract and
26 then to effectively prevent PacAdvantage from their day in court
27 by upholding an improper forum clause. Cap Gemini's Motion to
28

1 Transfer is an attempt to prevent a smaller company with limited,
 2 if no ability to prosecute an action across the country from
 3 seeking redress for Cap Gemini's failures per the contract. This
 4 is an attempt to "smoke out" the "little guy" and maintain money
 5 conferred upon the mistaken belief that services would be
 6 adequately performed.

7 Cap Gemini was compensated and failed to perform their end
 8 of the bargain. Cap Gemini is forum shopping and preventing
 9 PacAdvantage from "their day in court."

10 IV. CONCLUSION

11 As the forum selection clause in the Agreement between
 12 PacAdvantage and Cap Gemini is permissive, PacAdvantage
 13 respectfully requests this Court deny Cap Gemini's Motion to
 14 Dismiss, or Alternatively, To Transfer Venue. Alternatively,
 15 PacAdvantage requests this Court find it is "unreasonable" to
 16 uphold the forum selection clause against PacAdvantage and deny
 17 Cap Gemini's Motion to Dismiss, or Alternatively, To Transfer
 18 Venue.

19 DATED: April 11, 2007

SELMAN BREITMAN LLP

20
 21 By: 

MONICA CRUZ THORNTON

JENNIFER J. CAPABIANCO

Attorneys for Plaintiff

PACIFIC HEALTH ADVANTAGE DBA PAC
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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

10
11 PACIFIC HEALTH ADVANTAGE dba PAC
ADVANTAGE,

12 Plaintiff,

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14 CAP GEMINI ERNST & YOUNG,

15 Defendant.
16

CASE NO. C07 1565 PJH

Date : May 2, 2007

Time : 9:00 a.m.

Dept : Courtroom 3, 17th Floor

Judge: Hon. Phyllis J. Hamilton

17 DECLARATION OF LUCIA C. SAVAGE IN
18 SUPPORT OF PLAINTIFF PACIFIC
HEALTH ADVANTAGE'S OPPOSITION TO
19 DEFENDANT CAP GEMINI ERNST &
20 YOUNG U.S. LLC'S MOTION TO
21 DISMISS, OR ALTERNATIVELY, TO
22 TRANSFER FOR IMPROPER VENUE

Complaint Filed : November 2006

23 DECLARATION OF LUCIA C. SAVAGE

24 1. I am the General Counsel for Pacific Health Advantage
(hereinafter "PacAdvantage").

25 2. The facts set forth herein are known to me personally,
26 and if called upon to testify, I could and would competently
27 testify thereto.
28

1 3. PacAdvantage is a charitable non-profit corporation
2 which operated a health insurance purchasing pool for small
3 businesses. This pool was founded by the State of California in
4 1992. PacAdvantage assumed operational oversight of the pool in
5 1999. PacAdvantage closed the operations effective December 31,
6 2006.

7 4. PacAdvantage's corporate offices are located in San
8 Francisco, California.

9 5. In or about December 19, 2002, PacAdvantage contracted
10 with Cap Gemini Ernst & Young (hereinafter "Cap Gemini") wherein
11 Cap Gemini was to consult on the implementation of the PX2
12 software for PacAdvantage (hereinafter the "Project").

13 6. All Pac Advantage employees involved in the
14 implementation of the project reside in the Northern California
15 area.

16 7. PacAdvantage executed the Agreement with Cap Gemini in
17 Northern California.

18 8. Ira Rothman, Principal of Cap Gemini, was
19 PacAdvantage's primary contact person at Cap Gemini and was
20 located in Northern California when the services were performed.

21 9. All physical meetings between PacAdvantage and Cap
22 Gemini occurred in Northern California.

23 10. Cap Gemini performed its services under the contract in
24 Northern California.

25 11. PacAdvantage does not conduct business outside the
26 State of California.

27 12. At this time, PacAdvantage does not have active,
28

1 ongoing business operations and therefore has no ongoing revenue
2 stream. All expenses must come out of charitable assets.

3 13. PacAdvantage does not have sufficient funds to
4 transport all necessary witnesses to New York, New York to
5 prosecute this action.

6 I declare under penalty of perjury that the foregoing is
7 true and correct.

8
9 Executed this 11th day of April, 2007.

10
11 
12 LUCIA C. SAVAGE

Selman Breitman LLP
ATTORNEYS AT LAW

Selman Breitman LLP

PROOF OF SERVICE

PACIFIC HEALTH ADVANTAGE dba PAC ADVANTAGE v. CAP GEMINI ERNST & YOUNG U.S., LLC

San Francisco County Superior Court Case No. C 07 1465

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

I am employed in the County of San Francisco, State of California. I am over the age of 18 years and am not a party to the within action; my business address is 33 New Montgomery, Sixth Floor, San Francisco, CA 94105. On April 11, 2007, I served the following document(s) described as **PLAINTIFF PACIFIC HEALTH ADVANTAGE'S OPPOSITION TO DEFENDANT CAP GEMINI ERNST & YOUNG U.S. LLC'S MOTION TO DISMISS, OR ALTERNATIVELY, TO TRANSFER FOR IMPROPER VENUE** on the interested parties in this action as follows:

by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

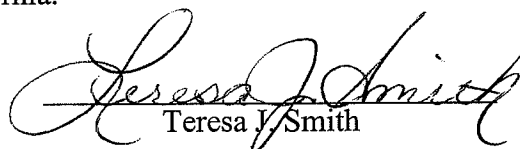
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Capgemini U.S. LLC f/k/a Cap Gemini
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- X BY MAIL: By placing a true copy thereof in a sealed envelope addressed as above, and placing it for collection and mailing following ordinary business practices. I am readily familiar with the firm's practice of collection and processing correspondence, pleadings, and other matters for mailing with the United States Postal service on that same day with postage thereon fully prepaid at San Francisco, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.
- ☐ BY OVERNIGHT COURIER: I caused the above-referenced document(s) to be delivered to for delivery to the addressee(s).
- ☐ BY E-MAIL: I transmitted a copy of the foregoing documents(s) via e-mail to the addressee(s).
- ☐ BY FAX: I transmitted a copy of the foregoing documents(s) via telecopier to the facsimile numbers of the addressee(s), and the transmission was reported as complete and without error.
- ☐ BY PERSONAL SERVICE: I personally delivered such envelope by hand to the offices of the addressee(s).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 11, 2007, at San Francisco, California.


Teresa J. Smith